(Tr. 439, 1381–1401). Crisona also stated that he had resigned from Colombia (Tr. 442).

6. In June, 1966, two partners, Morris Mitchell and Ary Infante, were induced to take ads in local papers stating that they had a source for funds (Tr. 1028–1029, 1040). Both De Lyras and Neiman collected the advance fees from customers who answered the ads (Tr. 1030–1059). Crisona was listed as the attorney on all the commitments except one (Tr. 1097).

7. In December 1965, Neiman, using the assumed name "S. P. Williams," contacted A. Earle Brown, the owner of Sunrise Mountain Corporation,[4] concerning a three million dollar loan which Brown was attempting to secure. (Tr. 1196–1197, 32, 281–282, 288). After several meetings at which Parks was introduced as a Colombia officer and West Coast liaison man (Tr. 49–50, 238–241), Brown agreed with Neiman and Crisona to pay $30,000 as a standby fee for the loan commitment (Tr. 33–36, 311–313, 1198–1199). Crisona was paid $7,500 out of the $30,000 as an attorney's fee and the remainder was deposited in escrow (Tr. 36, 41–43, 50, 314–317, 1203–1204). Brown's attorney, Richard Crake, was then persuaded to release the amount in escrow on assurances that it was needed to finalize the funding (Tr. 63–65, 1205). This money was then divided among petitioners (Tr. 1208, 1214–1218). The date for completing the financing was originally set for around December 20, 1965, but was postponed by

[4] Sunrise Mountain Corporation was in the process of Chapter XI reorganization.

Colombia throughout December and into January, despite Brown's eagerness to obtain the funds (Tr. 51, 319, 68, 89). The loan was never secured (Tr. 68).

At trial, Crake testified to the substance of a telephone conversation between himself and Crisona on January 18, 1966 (Tr. 90–94). In the conversation, Crake expressed skepticism as to the good faith of the officers of Colombia and as to the probability of funding (Tr. 91). In turn, Crisona repeatedly assured Crake that the corporation was legitimate and enumerated several of the allegedly successful business ventures concluded by Colombia (Tr. 91–92). Crisona also mentioned that the $7,500 he had received as an attorney's fee had been turned over to Colombia; that this fee would be returned to him (Crisona) by Colombia in a day or two; and that he expected the loan to be finalized shortly (Tr. 91). At the conclusion of Crake's direct testimony, the jury was allowed to hear a recording made by Crake at the time of the conversation and to use a transcript of the recording as an aid (Tr. 96, 114).

An F.B.I. report of an interview with Crake indicated that Crake had recorded other conversations with representatives of Colombia Resources (Tr. 98–99). On cross-examination, Crake testified that he recorded other conversations with Crisona during the three-day period he was in New York in January. He stated that he had since turned these recordings over to the government (Tr. 158–159). He also testified that he recorded a conference call with "Williams" (Neiman) and a judge of a bankruptcy court (Tr. 161–167). He turned these tapes over to the

F.B.I. (Tr. 160). No further testimony regarding the content of the tape recordings was elicited at trial.

Counsel for Crisona, subsequently joined by counsel for all the petitioners, sought production of all the tapes Crake had made (Tr. 98–108, 169–180, 275–276, 1270–1278). The claim was based alternatively on 18 U.S.C. 3500, on Rule 16 of the Federal Rules of Criminal Procedure, and on the doctrine of *Brady* v. *Maryland,* 373 U.S. 83. The government denied any obligation to produce the tapes other than the one about which Crake had testified on direct examination, and stated that they contained no material helpful to the defense (Tr. 173). The district court decided that the government was not required to produce the tapes and refused to listen to them (Tr. 178, 180, 1278).

On appeal, the Second Circuit concluded that the tapes were discoverable by the defendant whose voice was recorded thereon as "statement," as that term is used in Rule 16(a) of the Federal Rules of Criminal Procedure. After having examined transcripts of the tapes *in camera,* however, the court was convinced that error in failing to turn over the tapes was harmless (Pet. App. 10a–18a).

## ARGUMENT

Relying upon *Alderman* v. *United States,* 394 U.S. 165, petitioners Crisona and Parks challenge the court of appeals' *in camera* inspection of the transcript of Crake's tapes of his telephone conversations with them and its ruling that their non-disclosure was harmless error. They contend that their mate-

riality could be determined only by the defense. However, the tapes relate only to one loan; as to that loan, they reveal only conversations with Crake over a three day period in January, after the advance fee on that one loan had been paid; the government was not implicated in the taping. Thus, the court below could properly deem the error harmless, having examined the tapes. *Alderman* involved government electronic surveillance, assumed to be in violation of the Fourth Amendment. In that context, the defendants would be entitled to the exclusion from evidence of any "fruits" of the illegality; to develop the possibility that such fruits had been harvested, this Court deemed an adversary examination of the transcripts required. Here, on the other hand, no question is raised of exclusion of this or other evidence; the issue is whether the defense was prejudicially deprived of important information about the government's case—favorable (Rule 16(a)) or unfavorable (*Brady* v. *Maryland*)—which it was entitled to inspect. To determine *this* issue, "the trial judge had only to place the transcript or other record of the surveillance alongside the record evidence and compare the two." *Alderman, supra,* 394 U.S. at 182. Thus in the present case the court of appeals could see for itself that production of the recordings would not have affected the cases.[5]

[5] The transcripts of the tape recordings disclose that most of Parks' conversations consisted of relaying messages. The cross-examination of Parks to which his petition refers (Tr. 2350–2351) was merely as to whether he had objected to a late hour telephone call from Brown. As to Crisona, the transcripts not turned over contain no information beyond that contained in the one played to the jury.

2. During the government's case, counsel for John De Lyra asked the trial judge for an advance ruling on whether the government could raise prior convictions for impeachment purposes if petitioner John De Lyra took the stand in his own behalf.[6] The trial judge wanted to consider this request in light of *United States* v. *Palumbo,* 401 F. 2d 270 (C.A. 2), certiorari denied, 394 U.S. 947 (Tr. 1326–1328).[7] The trial judge subsequently refused to make an anticipatory ruling (Tr. 1597–1598). As the court of appeals noted, defendants are not automatically entitled to rulings on the admissibility of impeachment evidence prior to ~~their~~ its introduction. The reason for this procedure is that the admissibility necessarily depends upon what is adduced on the direct examination. In this case, petitioner De Lyra has not shown that the trial judge's decision not to give him an advance ruling on the admissibility of testimony tending to impeach his credibility was an abuse of discretion. Indeed, petitioner has never indicated what his testimony would have been or how it would have been affected by the introduction of prior convictions (Pet. App. 20a–21a). See also *United States* v. *Hart,* 407

[6] John De Lyra had been convicted of vagrancy and petit larceny in 1935 and he was later charged with concealment of leased property which resulted in a fine of $300 (Pet. App. 20a–21a).

[7] In *Palumbo* the court affirmed the proposition that a judge has discretion in ruling on the admission of prior convictions and "must balance all relevant factors to determine whether its probative value is outweighed by its prejudicial effect" (401 F. 2d at p. 273). The judge also has discretion to decide whether an advance ruling is warranted.

F. 2d 1087 (C.A. 2), certiorari denied, 395 U.S. 916; *United States* v. *Sternback*, 402 F. 2d 353 (C.A. 7), certiorari denied, 393 U.S. 1082.

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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